of any license or tax, with the exception that he should not deal in ardent and intoxicating drinks, a municipality could not require of him a license for the sale of "near beer," a nonintoxicating liquor. The court said: "The mere fact that one of the witnesses testified that the 'near beer' sold contained enough alcohol to preserve it would not afford evidence that it was an ardent drink, any more than an intoxicating drink. '"Ardent spirits" is a term applied to liquors obtained by distillation, such as rum, whiskey, brandy, and gin.' Sarlls *v.* United States, 572, 14 Sup. Ct. 721, 38 L. Ed. 556. According to the proof the drinks sold by the defendant were neither ardent nor intoxicating." And again: "If he was selling either ardent or intoxicating drinks, the municipality could neither license him nor punish him for selling without a license; the power to license the sale of such drinks being forbidden by the state under the terms of the prohibition bill, and the right to punish being also reserved by the state." Burch *v.* City of Ocilla, 62 S. E. 666, 668. See State *v.* Dannenberg (N. C.), 63 S. E. 946, where it is said: "Municipal ordinances must harmonize with such (state) laws, and, where the offense is covered by the latter, the former must give way. This has long been settled."

J. F. M.

WHITE OAK COAL CO. v. CITY OF MANCHESTER.

June 10, 1909.

[64 S. E. 944.]

Licenses (§ 6*)—Power to License—Vehicles Owned by Nonresidents.—The charter of a city provided that the council may grant licenses to owners of wagons, drays, etc., employed in the city for hire, and may require such owners using them in the city to take out a license therefor, and an ordinance declared that no wheel carriage shall be kept in the city for hire unless the owner or keeper thereof procure a license therefor. Held, that the city could not impose a license tax upon the vehicles of a coal company that had no yard within the city, but unloaded coal within the city and delivered it to a purchaser outside the city limits.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 6.* 9 Va.-W. Va. Enc. Dig. 310; 318, 319.]

Judgment reversed. Cardwell, J., absent.

Appeal from Corporation Court of Manchester.

Action by the City of Manchester against the White Oak Coal Company. Judgment for plaintiff, and defendant appeals. Reversed, and proceedings dismissed.

Page & Leery, for appellant.
Charles L. Page, for appellee.

WHITTLE, J. The plaintiff in error, the White Oak Coal Com-

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

pany, is a corporation engaged in business as a coal merchant at the city of Richmond, with its yards, offices, and stables located in that city, where it pays a license tax on the wagons employed in its business. Having sold a consignment of coal to a customer in Chesterfield county, it caused the cars containing the coal to be stopped on a siding of the railroad company in the city of Manchester, and from that point proceeded to haul the coal in its wagons over the streets of the city to the place of business of the purchaser outside the city limits.

The charter of the city provides that "the council may grant or refuse licenses to owners or keepers of wagons, drays * * * and other wheel carriages kept or employed in the city for hire, and may require the owners and keepers of wagons, drays and carts, using them in the city, to take out a license therefor, and may require taxes to be paid thereon, and subject the same to such regulations as they may deem proper, and prescribe fees and compensation."

The ordinance passed in pursuance of the foregoing provision declares that "no wagon, dray * * * or other wheel carriage shall be kept or employed in the city for hire, directly or indirectly, unless the owner or keeper thereof obtain a license therefor."

Upon the foregoing facts the plaintiff in error controverts the contention that the city had authority to impose a license tax on its wagons.

The general principle is well recognized that the highways of the commonwealth, whether urban or rural, belong primarily to the public, and that the absolute dominion over them is lodged in the Legislature. It is true the control of streets is commonly delegated to the municipalities in which they are located in such measure as the Legislature sees fit to bestow. Nevertheless the use of them remains in the public at large, subject only to such limitations as the municipalities are authorized by law to impose. City of Richmond *v.* Smith, 101 Va. 161, 43 S. E. 345; Elliott on Roads & Streets (2d Ed.), § 645. Moreover, it is the policy of the state that each locality shall bear the burden of maintaining its own highways.

Bearing in mind these principles, it is generally regarded as a reasonable exercise of such charter powers to lay a license tax upon vehicles of residents of the municipality and upon persons residing outside of the corporate limits who employ their vehicles in furtherance of business and occupations carried on within the city. But to levy such tax on vehicles of nonresidents whose business or pleasure casually carries them into or through the city would be in derogation of their reserved right to use the highways of the commonwealth and impose intolerable conditions upon the public, and lead to absurd results.

As corollary to these well-settled rules, the grant by the Legislature of municipal control over streets must be construed strictly in the interest of common right.

In Bennett *v.* Birmingham, 31 Pa. 15, discussing the power of cities to demand such exactions, the court says: "Such statutes and ordinances are contrary to the usual course of taxation and embarrassing to the public, and ought to be strictly construed." In that case, by act of the Legislature, the town council of Birmingham "were authorized to direct all owners of carts, wagons and other vehicles using the paved streets of said borough, to pay such moderate license for such use as they might by ordinance direct." The court held that this grant of power did not authorize the imposition of a tax on vehicles owned by nonresidents and used in hauling goods and produce through the town from one adjacent township to another.

So, also, in the case of Cary *v.* North Plainfield, 49 N. J. Law, 110, 113, 7 Atl. 42, 43, the court said: "The inconvenience attendant upon the exercise by every municipality in the state of the power of excluding from its limits all unlicensed vehicles engaged in transporting goods or passengers for hire is manifest. Its legitimate operation would require the owners of such vehicles to obtain licenses not only from the authorities of the place where their business had its headquarters, but also from every neighboring town into which their casual engagements might call them, or else to unload their vehicles at the border line. A general law having effects so burdensome or so absurd is not to be anticipated, and only unequivocal language could convince a court that such legislation was intended. The statute now under review is not of this character. Its terms are satisfied by holding that license taxes are to be imposed only by that municipality in which the business or occupation is carried on or conducted." Commonwealth *v.* Stodder, 2 Cush. (Mass.) 562, 48 Am. Dec. 679; St. Charles *v.* Nolle, 51 Mo. 122, 11 Am. Rep. 440; East St. Louis *v.* Bux, 43 Ill. App. 276.

The same principle is recognized by this court in Frommer *v.* City of Richmond, 31 Grat. 646, 31 Am. Rep. 746. Frommer lived outside of the city limits, but rented a stall in the city market, where he conducted his business as a butcher. He prepared his meat for market at his residence, and used his carts to haul it to his stall in the market. Upon these facts, the court held that Frommer was amenable to license tax on the carts thus used. The court rested its decision on the ground that the license tax was exacted for the privilege of using the carts on the streets of the city in pursuit of the owner's business in the city.

If the plaintiff in error had established a coalyard within the corporate limits of Manchester, the case would have been anal-

ogous to Frommer's case and ruled by it. But it is clear that the sporadic act of hauling a single consignment of coal from the siding in Manchester over the streets of the city to its customer on the outside was not carrying on such a business or occupation within the city as would subject the coal company to the license tax on vehicles imposed by the ordinance.

The conviction and fine imposed for the alleged violation of the ordinance was consequently illegal, and the judgment must be reversed, and the proceeding dismissed, with costs.

Reversed.

CARDWELL, J., absent.

CITIZENS' BANK OF NORFOLK *v.* SCHWARZSCHILD & SULZBERGER CO.

June 10, 1909.

[64 S. E. 954.]

Payment (§ 85*)—Payment by Mistake—Recovery.—Where a bank paid certain coupons payable to bearer at its banking house on surrender of the coupons under the mistaken belief that the debtor had money in the bank available for the purpose, the bank could not recover the money so paid.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 272-281; Dec. Dig. § 85.* 2 Va.-W. Va. Enc. Dig. 266; 11 id. 135, et seq.]

Judgment affirmed. All the judges concur.

Appeal from Law and Chancery Court of City of Norfolk.

Action by the Citizens' Bank of Norfolk against the Schwarzschild & Sulzberger Company. Judgment for defendant, and plaintiff appeals. Affirmed.

A. B. Seldner, for appellant.
Tobert W. Shultice, for appellee.

BUCHANAN, J. This is an action of assumpsit to recover money paid by the plaintiff under an alleged mistake of fact. Upon the issue of nonassumpsit, the whole matter of law and fact was submitted to the court and a judgment rendered in favor of the defendant.

The material facts of the case are that on the 4th day of November, 1907, the defendants, the Schwarzschild & Sulzberger Company, a corporation, presented through the Norfolk National

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